



## U.S. Copyright Office

### 37 CFR Part 210

[Docket No. 2023-2]

#### Fees for Late Royalty Payments Under the Music Modernization Act

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Notification of inquiry.

---

**SUMMARY:** The U.S. Copyright Office is issuing a notification of inquiry soliciting public comments regarding when fees for late royalty payments should be assessed in connection with reporting by digital music providers under the Music Modernization Act's blanket license.

**DATES:** Written comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Written reply comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** For reasons of governmental efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office's website at <https://copyright.gov/rulemaking/mma-late-fees/>. If electronic submission of comments is not feasible due to lack of access to a computer or the internet, please contact the Copyright Office using the contact information below for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Rhea Efthimiadis, Assistant to the General Counsel, by email at *meft@copyright.gov* or telephone at 202-707-8350.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Orrin G. Hatch-Bob Goodlatte Music Modernization Act (the “MMA”) substantially modified the compulsory “mechanical” license for reproducing and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.<sup>1</sup> It did so by switching from a song-by-song licensing system to a blanket licensing regime that became available on January 1, 2021 (the “license availability date”),<sup>2</sup> administered by a mechanical licensing collective (the “MLC”) designated by the Copyright Office (the “Office”).<sup>3</sup> Digital music providers (“DMPs”) are able to obtain this new statutory mechanical blanket license (the “blanket license”) to make digital phonorecord deliveries of nondramatic musical works, including in the form of permanent downloads, limited downloads, or interactive streams (referred to in the statute as “covered activity” where such activity qualifies for a blanket license), subject to various requirements, including reporting obligations.<sup>4</sup> DMPs also have the option to engage in these activities, in whole or in part, through voluntary licenses with copyright owners.

*A. The Copyright Royalty Judges’ Late Fee Regulations*

Under section 115, the Copyright Royalty Judges (“CRJs”) are responsible for setting the blanket license’s rates and terms of royalty payments. As part of this ratesetting authority, the CRJs’ determinations “may include terms with respect to late

---

<sup>1</sup> Pub. L. 115-264, 132 Stat. 3676 (2018).

<sup>2</sup> 17 U.S.C. 115(e)(15).

<sup>3</sup> As permitted under the MMA, the Office also designated a digital licensee coordinator (the “DLC”) to represent licensees in proceedings before the Copyright Royalty Judges and the Office, to serve as a non-voting member of the MLC, and to carry out other functions. 84 FR 32274 (July 8, 2019).

<sup>4</sup> 17 U.S.C. 115(d).

payment[s]” (“late fees”).<sup>5</sup> The Office has a corresponding responsibility to oversee the administration of the blanket license, including promulgating regulations governing reporting and payment requirements for DMPs. The MMA added a new provision to section 115 to address the new blanket license, stating that “[l]ate fees for past due royalty payments shall accrue from the due date for payment until payment is received by the [MLC].”<sup>6</sup>

The currently operative late fee provision was adopted by the CRJs as part of an approved settlement in the *Phonorecords IV* proceeding, which covers the time period 2023 through 2027.<sup>7</sup> The provision states that “[a] Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I)<sup>8</sup> or 17 U.S.C. 115(d)(4)(A)(i),<sup>9</sup> as applicable and detailed in part 210<sup>10</sup> of this title.”<sup>11</sup> It further provides that “[l]ate fees shall accrue from the due date until the

---

<sup>5</sup> *Id.* at 803(c)(7).

<sup>6</sup> *Id.* at 115(d)(8)(B)(i).

<sup>7</sup> 87 FR 80448 (Dec. 30, 2022).

<sup>8</sup> Section 115(c)(2)(I) states that, except as provided in section 115(d)(4)(A)(i), “royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding.”

<sup>9</sup> Section 115(d)(4)(A)(i) states that “[a] digital music provider shall report and pay royalties to the [MLC] under the blanket license on a monthly basis in accordance with . . . subsection (c)(2)(I), except that the monthly reporting shall be due on the date that is 45 calendar days, rather than 20 calendar days, after the end of the monthly reporting period.”

<sup>10</sup> “Part 210” refers to the Office’s regulations governing reporting and payments under section 115.

<sup>11</sup> 37 CFR 385.3.

Copyright Owner receives payment.”<sup>12</sup> In adopting the parties’ settlement, the CRJs found that the late fee provision was “not unreasonable.”<sup>13</sup>

### *B. The Office’s September 2020 Rule and Adjustments*

On September 17, 2020, the Office issued an interim rule adopting regulations concerning reporting and payment requirements under the blanket license (the “September 2020 Rule”).<sup>14</sup> The September 2020 Rule addressed the ability of DMPs to make adjustments to monthly and annual reports and related royalty payments, including to correct errors and replace estimated royalty calculation inputs (*e.g.*, the amount of applicable public performance royalties) with finally determined figures.<sup>15</sup> The interim regulations permit DMPs to make adjustments in other situations as well, such as in exceptional circumstances, following an audit, or in response to a change in the applicable statutory rates or terms adopted by the CRJs.<sup>16</sup>

---

<sup>12</sup> *Id.* Parties in the most recent section 115 ratesetting proceeding recognized that this language “does not acknowledge that the [MLC] has responsibility for collecting payment under the blanket license for digital uses” and moved to add the following language to the end of the quoted language: “except that where payment is due to the mechanical licensing collective under 17 U.S.C. 115(d)(4)(A)(i), late fees shall accrue from the due date until the mechanical licensing collective receives payment.” Mot. to Req. Issuance of Amendment to Determination at 1–2, Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), Copyright Royalty Bd., No. 21-CRB-0001-PR (2023–2027) (Jan. 10, 2023), <https://app.crb.gov/document/download/27417>. The current provision is similar to the CRJs’ pre-MMA late fee regulations for the section 115 license. *See, e.g.*, 37 CFR 385.4 (2018) (“A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received by the Copyright Owner after the due date set forth in [sec.] 210.16(g)(1) of this title. Late fees shall accrue from the due date until payment is received by the Copyright Owner.”).

<sup>13</sup> 87 FR 80448, 80452 n.20.

<sup>14</sup> 85 FR 58114 (Sept. 17, 2020). That proceeding involved multiple rounds of public comments through a notification of inquiry (“NOI”), 84 FR 49966 (Sept. 24, 2019), a notice of proposed rulemaking (“NPRM”), 85 FR 22518 (Apr. 22, 2020), and an *ex parte* communications process. Guidelines for *ex parte* communications, along with records of such communications, including those referenced herein, are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. All Office rulemaking activity, including public comments, as well as educational material regarding the MMA, can currently be accessed via navigation from <https://www.copyright.gov/music-modernization>. References to public comments in the Office’s proceedings are either cited in full or are by party name (abbreviated where appropriate), followed by “NOI Initial Comments,” “NOI Reply Comments,” “NPRM Comments” or “*Ex Parte* Letter,” as appropriate.

<sup>15</sup> 37 CFR 210.27(d)(2)(i), (f), (g)(3)–(4), (k).

<sup>16</sup> *Id.* at 210.27(k)(6).

With respect to the timing of the DMPs' reports and payments, their monthly reports of usage and related royalty payments must be delivered to the MLC no later than 45 days after the end of the monthly reporting period.<sup>17</sup> Reports of adjustment adjusting monthly reports of usage must either be combined with the annual report of usage covering the relevant monthly report or delivered to the MLC before such annual report.<sup>18</sup> Annual reports of usage must be delivered to the MLC no later than the 20<sup>th</sup> day of the sixth month following the end of the DMP's fiscal year covered by the annual report.<sup>19</sup> Reports of adjustment adjusting annual reports of usage must be delivered to the MLC no later than 6 months after the occurrence of a relevant triggering event.<sup>20</sup> Any underpayment of royalties associated with a report of adjustment must be paid to the MLC contemporaneously with delivery of the report of adjustment or promptly after receiving an invoice from the MLC.<sup>21</sup>

During the course of the rulemaking proceeding that culminated in the September 2020 Rule, interested parties, including the MLC and DLC, raised opposing views about whether late fees adopted by the CRJs apply to royalty payments made in connection with reports of adjustment.<sup>22</sup> The DLC proposed that the Office adopt regulations to clarify that adjustments to estimates are not a basis for assessing late fees where a DMP makes its estimates and adjustments in accordance with the Office's regulations, including applicable reporting deadlines.<sup>23</sup> In support of its proposal, the DLC said that "the late fee is meant to ensure that digital music providers are following the regulations," and "[i]f a service is following the regulations by making a reasonable

---

<sup>17</sup> *Id.* at 210.27(g)(1); *see* 17 U.S.C. 115(d)(4)(A)(i).

<sup>18</sup> 37 CFR 210.27(g)(4)(i), (k)(1).

<sup>19</sup> *Id.* at 210.27(g)(3).

<sup>20</sup> *Id.* at 210.27(g)(4)(ii).

<sup>21</sup> *Id.* at 210.27(k)(4).

<sup>22</sup> 85 FR 58114, 58136–37; 85 FR 22518, 22530.

<sup>23</sup> DLC NOI Reply Comments at 16–17, Add. A-8; DLC NPRM Comments at 14.

estimate of an input it does not know the value of, it should not be penalized with a late fee even if it so happens that the estimate is too low.”<sup>24</sup> The MLC and others disagreed with the DLC’s position, and the MLC proposed regulatory text providing that no estimate shall change or affect the due date for royalty payments or the applicability of late fees to any underpayment resulting from an estimate.<sup>25</sup> In support of its proposal, the MLC stated that the relevant due date is the monthly due date set by statute regardless of any adjustment, and that “[t]o permit DMPs to estimate inputs in a manner that results in underpayment to songwriters and copyright owners, without the penalty of late fees, encourages DMPs to underpay, to the detriment of songwriters and copyright owners.”<sup>26</sup>

After reviewing the relevant comments, the Office explained that it “appreciates the need for relevant regulations to avoid unfairly penalizing DMPs who make good faith estimates from incurring late fees due to subsequent finalization of those inputs outside the DMPs’ control, and also to avoid incentivizing DMPs from applying estimates in a manner that results in an initial underpayment that delays royalty payments to copyright owners and other songwriters.”<sup>27</sup> The Office, however, declined to adopt a rule addressing the interplay between the CRJs’ late fee regulation and the Office’s provisions

---

<sup>24</sup> DLC NOI Reply Comments at 16–17 (further asserting that “if the rule were otherwise, PROs could delay finalizing agreements (while still being paid interim royalties) with the purpose of causing digital service providers to have to pay late fees to publishers as a result”); *see also* DLC NPRM Comments at 14 (“Although the CRJs set the *amount* of the late fee, the Office is responsible for establishing *due dates* for adjusted payments. It is those due dates that establish whether or not a late fee is owed.”).

<sup>25</sup> MLC NPRM Comments at 36–37, App. C at xiv; MLC *Ex Parte* Letter at 7–8 (Feb. 26, 2020); *see also* AIMP NPRM Comments at 4–5 (“[L]ate royalty payments have been a significant problem for copyright owners, and the implementation of a late fee for any royalty amounts paid late was a significant step forward. The regulations as proposed, should remove any doubt that might interfere with those late fee payments.”); Peermusic NPRM Comments at 5 (“[W]e appreciate the Copyright Office’s rejection of the DLC request that underpayments, when tied to ‘estimates,’ should not be subject to the late fee provision of the CRJ regulations governing royalties payable under Section 115, and we would request that the regulations be clear on this point.”).

<sup>26</sup> MLC NPRM Comments at 36–37; *see also* AIMP NPRM Comments at 4–5 (“[E]xpanded use of estimates, and the result of retroactive adjustment of royalty payments, does create increased risk and additional burden to copyright owners.”).

<sup>27</sup> 85 FR 58114, 58137.

for adjustments because it was not clear at the time of the September 2020 Rule that doing so would be the best course, “particularly where the CRJs may wish themselves to take the occasion of [the *Phonorecords III*] remand or otherwise update their operative regulation in light of the [September 2020 Rule].”<sup>28</sup> At the time, the Office said it would instead “monitor the operation of this aspect of the [September 2020 Rule], and as appropriate in consultation with the CRJs.”<sup>29</sup>

### *C. Current Status*

Since the September 2020 Rule, however, the CRJs have not taken any action on the late fee issue and have not indicated that they plan to do so. During this same time period, the MLC and DLC submitted comments in response to a May 2022 amendment to the September 2020 Rule that again raised the issue of late fees and confirmed their continued disagreement on the subject.<sup>30</sup> Both the MLC and DLC requested the Office to provide guidance.<sup>31</sup> The DLC requested that the Office “specify that when both the initial estimated payments and the later adjustment of such payments to account for the updated and finalized information are made according to the timelines established in the regulations, such payments are proper and have been made by the ‘due date for payment’ as set forth in 17 U.S.C. [sec.] 115(d)(8)(B)(i).”<sup>32</sup> The MLC opposed the DLC’s position<sup>33</sup> and instead proposed regulatory language providing that nothing in the

---

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> MLC *Ex Parte* Letter at 8 (Oct. 17, 2022); MLC *Ex Parte* Letter at 2–5 (Dec. 21, 2022); DLC Comments to Supplemental Interim Rule at 3, Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment, U.S. Copyright Office, No. 2020-5 (July 8, 2022), <https://www.regulations.gov/comment/COLC-2020-0005-0029> (“DLC July 2022 Comments”).

<sup>31</sup> See 85 FR at 58136–37; MLC *Ex Parte* Letter at 8 (Oct. 17, 2022); MLC *Ex Parte* Letter at 2–5 (Dec. 21, 2022); DLC July 2022 Comments at 3.

<sup>32</sup> DLC July 2022 Comments at 3.

<sup>33</sup> MLC *Ex Parte* Letter at 2–5 (Dec. 21, 2022).

adjustment provisions “shall change a blanket licensee’s liability for late fees, where applicable.”<sup>34</sup>

The Office typically does not offer interpretations of the CRJs’ regulations. However, it is squarely within the Office’s authority to interpret the meaning of “due date” as used in the statute.<sup>35</sup> Moreover, Congress expressly authorized the Office to issue regulations establishing the adjustment reporting and payment regime.<sup>36</sup> Thus, the Office is publishing this notification to facilitate a full airing of all relevant issues and to expand the public record to better inform what action the Office should take to address this matter.

## **II. Subjects of Inquiry**

The Office invites written comments on the following subjects:

1. Please provide your views regarding whether a DMP is obligated to pay late fees when it makes an adjustment that reveals an underpayment of royalties. For example, should late fees apply to all adjustments, should they apply to no adjustments, or should they apply only to certain types of adjustments? Should it matter whether a DMP acted reasonably and in good faith and complied with all applicable regulations when it made the reporting or payment that later needed to be adjusted? Common scenarios, such as adjustments to fix errors in prior reporting as well as the scenarios referenced in 37 CFR 210.27(k)(6), should be discussed. Proposals with specific regulatory language are encouraged.
2. Please provide detailed legal arguments supporting your views about the application of late fees in the context of adjustments, including an analysis of

---

<sup>34</sup> MLC *Ex Parte* Letter at 8 (Oct. 17, 2022).

<sup>35</sup> See 17 U.S.C. 115(d)(8)(B)(i) (“Late fees for past due royalty payments shall accrue from the due date for payment until payment is received by the mechanical licensing collective.”).

<sup>36</sup> *Id.* at 115(d)(4)(A)(iv)(II) (“The Register of Copyrights shall adopt regulations . . . regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods.”); see *id.* at 115(d)(12)(A).



section 115's text and the legislative history and intent behind any relevant statutory provisions. In particular, commenters should discuss 17 U.S.C.

115(d)(8)(B)(i) and how that provision should be read in connection with the statutory reporting and payment due date provisions in 17 U.S.C. 115(c)(2)(I) and (d)(4)(A)(i) as well as the Office's regulatory due date provisions for adjustments in 37 CFR 210.27(g)(3), (g)(4), and (k)(1). Commenters should also address how their position is consistent with other provisions referring to due dates, such as 17 U.S.C. 115(c)(2)(J), (d)(3)(G)(i)(I), and (d)(4)(E).

3. Please discuss your understanding of the history and purpose of the CRJs' authority under 17 U.S.C. 803(c)(7), as adjusted by 17 U.S.C. 115(d)(8)(B), to adopt late fees and of the actual late fee provisions adopted by the CRJs, including in contexts outside of section 115 if relevant.<sup>37</sup>
4. What is the appropriate division of the Office's and CRJs' respective regulatory authority in this area? For example, can the Office or CRJs adopt a rule pursuant to which late fees may or may not apply depending on the type of adjustment at issue (*e.g.*, where the effect of a hypothetical rule might be that late fees apply to adjustments to estimates, but not to adjustments responding to royalty rate changes adopted by the CRJs)? Is the Office's authority more limited in relation to the CRJs' authority (*e.g.*, to determining the applicable due date after which a payment is deemed late)?
5. Please discuss any relevant music industry practices surrounding late fees and adjustments. For example:

---

<sup>37</sup> See, *e.g.*, 37 CFR 380.2(d), 380.6(g), 380.22(f), 382.3(e), 382.7(g), 383.4(a), 384.4(e), 385.3. For example, in the section 114 webcasting context, the CRJs have stated that "[i]nconsequential good-faith omissions or errors should not warrant imposition of the late fee," 72 FR 24084, 24108 (May 1, 2007), and have adopted a late fee provision allowing SoundExchange (the designated collective under the section 114 license) to "waive or lower late fees for immaterial or inadvertent failures of a Licensee to make a timely payment or submit a timely Statement of Account." 37 CFR 380.2(d)(1).

- a. Did DMPs typically pay late fees to copyright owners in connection with adjustments under section 115 prior to the MMA’s new blanket licensing regime? If not, did copyright owners make any demands for late fees or otherwise respond to the failure to pay late fees?
  - b. How do voluntary licenses involving covered activity operate in the context of late fees and adjustments? Do such voluntary licenses typically contain late fee provisions? Are they analogous to the one adopted by the CRJs in 37 CFR 385.3? How are they applied to adjustments?
  - c. Does the nature of a payment—as a royalty payment, late fee payment, interest payment, or some other kind of payment—received by a musical work copyright owner (whether from the MLC or directly from a licensee) typically affect how the payment is accounted and paid through to the copyright owner’s songwriters for mechanical uses of their works made by DMPs or other licensees? If so, please discuss the general industry practice.<sup>38</sup>
  - d. Are any of the terms of late fee settlements between publishers and record companies who use the section 115 license instructive for the Office to consider in the context of this proceeding?<sup>39</sup>
6. Under 37 CFR 210.27(d)(2)(i), there are several requirements that DMPs must comply with to make use of an estimate, including that the estimate must be

---

<sup>38</sup> See Comments of Helienne Lindvall, David Lowery, and Blake Morgan on Proposed Regulations for Subparts A, C and D at 12, Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), Copyright Royalty Bd., No. 21-CRB-0001-PR (2023–2027) (Dec. 7, 2022), <https://app.crb.gov/document/download/27356> (asking the CRJs to adopt “clarifying language that would require the applicable Copyright Owner to treat any late fee payment so received as an additional royalty payment under any publishing agreement” because, otherwise, “a late fee might be treated as a catalog-wide penalty that a Copyright Owner collecting the late fee could argue should be retained for its own account”).

<sup>39</sup> See, e.g., *NMPA Late Fee Program*, <http://www.nmpalatefeesettlement.com> (last visited Feb. 2, 2023).

reasonable and determined in accordance with generally accepted accounting principles (“GAAP”), and the DMP’s reporting must explain the basis for the estimate and why it was necessary. Aside from assessing late fees, could concerns about DMPs potentially abusing the adjustment process be mitigated by enhancing these requirements? Could such concerns be addressed through other additional regulations surrounding estimates or adjustments that could assist the MLC in identifying any DMP noncompliance?

- a. Should the Office consider adopting a rule providing that if a DMP’s estimate results in an underpayment of more than a certain amount or percentage, the estimate is *per se* unreasonable and, thus, not in compliance with the Office’s regulations?<sup>40</sup>

7. If the Office concludes that late fees do not apply to certain types of adjustments, could the Office consider adopting regulations requiring DMPs to pay interest on such adjustments to make copyright owners whole for any lost time value of money?<sup>41</sup> If so, what should such regulations look like? What is an appropriate interest rate? Should such regulations be similar to the Office’s current regulations assessing interest on royalties paid with late or amended statements of account under the section 111 and section 119 statutory licenses?<sup>42</sup> Are there any

---

<sup>40</sup> Cf. 17 U.S.C. 115(d)(4)(D)(i)(VI) (requiring a DMP to bear the costs of the MLC’s audit if the auditor “determines that there was an underpayment by the [DMP] of not less than 10 percent”); Dep’t of the Treas., Internal Revenue Serv., Instructions for Form 2210, Underpayment of Estimated Tax by Individuals, Estates, and Trusts at 1–2 (2021), <https://www.irs.gov/pub/irs-pdf/i2210.pdf> (discussing thresholds for the penalty for underpaying estimated tax).

<sup>41</sup> See SONA & NSAI *Ex Parte* Letter at 2 (July 7, 2022) (asking the Office to “consider whether it has the authority to require interest to be paid” by DMPs if there is a delay in payment).

<sup>42</sup> See 37 CFR 201.11(i), 201.17(k)(4); 54 FR 14217, 14220 (Apr. 10, 1989) (adopting rule for section 111 and explaining that “[t]he Copyright Office does not wish to penalize cable systems for late and amended filings, but rather wishes to compensate copyright owners for the present value loss of royalties which should have been deposited on a timely basis”); 54 FR 27873, 27874–75 (July 3, 1989) (adopting rule for section 119); 57 FR 61832 (Dec. 29, 1992) (amending the applicable interest rate).

relevant music industry practices related to assessing interest on adjusted royalties?

8. Please provide any additional pertinent information not referenced above that the Office should consider in this proceeding.

**Dated:** February 17, 2023.

---

**Suzanne V. Wilson,**

*General Counsel and*

*Associate Register of Copyrights.*

**[BILLING CODE 1410-30-P]**

[FR Doc. 2023-03738 Filed: 2/22/2023 8:45 am; Publication Date: 2/23/2023]